IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.2.2007

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN

S.A.No.579 of 1996

Abdul Majid .. Appellant/Defendant

vs.

Thajul Hutha .. Respondent/Plaintiff

PRAYER : This Second Appeal has been filed under Section 100 C.P.C against the judgment and decree passed in A.S.No.72 of 1993 by the learned Subordinate Judge, Mayiladuthurai, dated 28.8.1995, confirming the judgment and decree of the learned District Munsif, Sirkali, made in O.S.No.509 of 1982, dated 14.9.1992.

For Appellant : Mr.A.Muthukumar

For respondent : Mr.M.Duraisamy

J U D G E M E N T

The present second appeal has been filed against the judgment and decree passed in A.S.No.72 of 1993, on the file of the Sub-Court, Mayiladuthurai, dated 28.8.1995, confirming the judgment and decree, dated 14.9.1992, on the file of the District Munsif Court, Sirkali in O.S.No.509 of 1982.

2. The defendant in O.S.No.509 of 1982 is the appellant in the present second appeal. The plaintiff had filed the said suit before the District Munsif, Sirkali, seeking recovery of vacant possession of the suit property, and for payment of a sum of Rs.350/- being value of the trees, Rs.900/- towards damages for use, Rs.25/- per month from the date of the plaint till the date of recovery and costs.

3. Heard the learned counsel appearing for the appellant and the respondent.

4. The brief facts of the case, as stated by the plaintiff in the said suit, are as follows:

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The plaintiff had purchased 0.13 cents of land mentioned in the plaint from one Raja Mohammad through a registered sale deed, dated 12.1.1965. From the date of the sale, the plaintiff was in possession and sole enjoyment of the property. One Abdul Salam represented by his power of attorney Chinnasamy Rowtha Mindar, Ayyanar and some others had filed a suit against the plaintiff and some others for permanent injunction in respect of the suit property. The said suit was dismissed by the District Munsif Court, Sirkali. The plaintiff in the above said suit did not file an appeal against the judgment. The plaintiff is in absolute possession and enjoyment of the suit property. Having fenced the land on all the four sides, he had put up a thatched hut and was living there from the end of 1973. The brother of the plaintiff's husband by name P.M.Deen Mohammad was looking after the property on behalf the plaintiff. The defendant is ex-chairman of the Village Panchayat. The defendant, with the help of one Pakkirisha, son of Sulaiman Rowthar, had cut down and taken away Neem trees, on 8.7.1976. When Deen Mohammad came to know of this and informed the same to the plaintiff, the plaintiff's son gave a complaint to the Sub-Inspector, Anaikaranchatram. Since the defendant and Pakkirisha and others were powerful and influential, no action was taken against them. The defendant, with the help of Pakkirisha, trespassed into the suit property by the end of December, 1977, cut off the fences and permitted one Shamsuddin to occupy the land by putting up a thatched shed. The defendant's house was also tethered in the suit land. The defendant, with the help of Pakkirisha, cut down and carried away a branch of another Neem tree and one more tree, on 19.12.1977. The defendant is bound to pay the cost of the same. Hence, the plaintiff sent a notice to the defendant to remove the temporary thatched shed and surrender vacant possession of the land to the plaintiff and also to clear the house. Though the defendant received the notice, he did not send any reply. Hence, this suit was filed for recovery of vacant possession of the suit property, payment of Rs.350/- towards value of the trees and for damages.

5. The brief averments in the written statement are as follows:

The defendant denied all the allegations in the plaint except those which were specifically admitted therein. The suit property, at no point of time, belonged to Raja Mohammad or the plaintiff. It is a Government Natham poramboke. The house site was trespassed by the defendant, on 15.6.1959. The defendant had fenced it and from then onwards, he had been in enjoyment of the same. Neither Raja Mohammad nor his mother ever purchased the suit property. Raja Mohammad had not been in enjoyment of the suit site. The above sale was not truly created for proper consideration. Raja Mohammad was not with sound mind. The said sale will not bind the defendant. The defendant was not a party to the proceedings either in O.S.No.219 of 1965 or A.S.No.47 of 1972. The defendant does not know anything of the same. The allegations in para 3 of the plaint were denied. On 15.1.1965, the plaintiff was not in enjoyment of the suit site. The defendant had fenced the site and was in enjoyment and possession right from 15.6.1969. It is not correct to say that Deen Mohammad was

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taking care of the property on behalf of the defendant. The defendant is renewing the fence every year. The defendant had not cut down any tree as alleged. The Plaintiff and the defendant have no enmity between them. No complaint was given against the defendant. The defendant need not pay Rs.200/- on the allegation that he cut down the tree. No trespass, as alleged in para 6 of the plaint, had ever happened. The defendant did not remove the fence. He did not permit Shamsuddin into the suit property. The defendant does not know Pakkirisha. He did not send any reply notice. Suit has not been properly valued. Hence, the suit has to be dismissed with costs.

6. Based on the rival contentions and in the light of the pleadings of the parties, the trial Court had framed the following issues for consideration:

> "1. Does the plaintiff has right over the suit property?
> 2. Is the sale deed, dated 12.1.1965, true?
> 3. Was the trespass alleged in the plaint true?
>
> 4. Has the defendant perfected his title through adverse possession?
> 5. Is the allegation in the plaint that trees were cut true?
> 6. Is the plaintiff entitled to recover possession of the suit property and damages?
> 7. Is the plaintiff entitled to claim damages for use and occupation by the defendant?
> 8. Has the suit been filed in time?
> 9. Has correct court fee been paid?
> 10.To what relief the plaintiff is entitled?"

7. On behalf of the plaintiff, P.Ws.1 to 3 were examined as witnesses and Exhibits A1 to A5 were marked and on the side of the defendant, D.Ws.1 to 4 were examined as witnesses and Exhibits B1 to B9 were marked.

8. After considering the plaint, written statement, evidence on record and the contentions raised on behalf of the parties concerned, the trial Court had decreed the suit granting the reliefs as prayed for by the plaintiff in the suit O.S.No.509 of 1982.

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9. Being aggrieved by the judgment and decree, dated 14.9.1992, made in O.S.No.509 of 1982, on the file of the District Munsif Court, Sirkali, the defendant in the suit had filed an appeal in A.S.No.72 of 1993 before the Sub Court, Mayiladuthrai. The lower appellate Court had framed the following points for consideration:-

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"1. Whether the sale deed, dated 12.1.1965 is true?

2. Has the defendant acquired title by adverse possession?

3. Is the plaintiff entitled for recovery of possession and damages for use and occupation?"

10. The lower appellate Court, after analysing the rival contentions and based on the records available before the said Court, had confirmed the judgment and decree of the trial Court holding that the suit property was in possession and enjoyment of the plaintiff from 12.3.1965 and that in the year 1977, the defendant had trespassed and occupied the suit property. Further, it had been proved that the suit property is a poramboke and that the defendant had obtained title by adverse possession. The lower appellate Court had also confirmed the findings of the trial Court with regard to the value of trees cut and carried away by the defendant and his men and it had also held that the defendant was liable to pay the damages as claimed by the plaintiff.

11. Aggrieved by the judgment and decree of the lower appellate Court, dated 28.8.1995, made in A.S.No.72 of 1993, the present second appeal had been filed by the appellant.

12. The second appeal had been admitted on the following substantial questions of law.

"(i) Whether both the Courts below were right and justified in law in decreeing the suit of the plaintiff when the plaintiff failed to establish title of his vendor?

(ii) Whether the Courts below were right in law in holding that the defendant-appellant did not perfect his title by adverse possession?"

13. It was contended before the trial Court by the plaintiff that she had purchased 13 cents of land being the suit property through a registered sale deed, dated 12.1.1965, from one Raja Mohammad and that the plaintiff was in possession and enjoyment of the property since then. It had also been stated that one Abdul Salam, through his power agent Rowtha Munda Nainar and some others, filed a suit in O.S.No.219 of 1965, on the file of the District Munsif Court, Sirkali, seeking for permanent injunction stating that the suit property was in their possession. It was further contended that the said suit was dismissed, on 25.11.1971 and the appeal in A.S.No.47 of 1972 filed against the judgment and decree in the said suit had also been dismissed, on 30.6.1973. While so, the defendant had instigated one Pakkirisha, son of Sulaiman Rowthar of Pudur, to cut

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down and carry away the Neem tree worth Rs.250/-, on 8.7.1976. Since, both the defendant and Pakkirisha have appropriated the same, the defendant was bound to pay the said sum of Rs.250/- to the plaintiff.

14. It was further contended that in the first week of December, 1977, the defendant and his men had trespassed into the property of the plaintiff and removed the front-side fence and had made Fakir Shamsuddin of the mosque to reside in the thatched shed put up by the plaintiff. The defendant had started tethering his house in a temporary shed erected with bamboo pillars. Later, on 10.12.1977, the defendant and the above said Pakkirisha cut the branches of another Neem tree and some other trees, the value of the same being Rs.100/-, which the defendant is bound to pay to the plaintiff. The plaintiff had sent a notice to the defendant, on receipt of which, the defendant and Pakkirisha had gone away from the suit house and he did not enter the place again. However, the defendant had prevented the plaintiff and his son from the suit properties by putting up hay stacks.

15. The defendant had contended that the suit property does not belong to the plaintiff or Raja Mohammad and that it was only a Government Natham poramboke and it was encroached by the defendant as house site, on 15.6.1959 and he had fenced the same and since then it was enjoyed by him. Since he was not a party to the suit O.S.No.219 of 1965 or Appeal A.S.No.47 of 1972, he was not aware of the findings in the said proceedings. The defendant had stated that neither the plaintiff nor Raja Mohammad had ever been in possession of the suit property and therefore, the suit has to be dismissed.

16. The certified copy of the sale deed, dated 12.1.1965, by which Raja Mohammad had transferred the suit property to the plaintiff was marked as Ex.A.1. The certified copy of the decree in O.S.No.219 of 1965, dismissing the suit, was filed as Ex.A.2. Ex.A.3 is the certified copy of the decree, whereby, A.S.No.47 of 1972 came to be dismissed by the Sub Court, Mayiladuthurai. Ex.A.4 is the copy of the notice sent by the plaintiff to the defendant. Ex.A.5 is the acknowledgment card showing receipt of the notice by the defendant. The plaintiff's son Sadakkathulla, who was examined as P.W.1, had stated that the plaintiff had purchased the suit property from one Raja Mohammad and the said Raja Mohammad had put up a thatched shed and was enjoying the property. Raja Mohammad had sold the property to the plaintiff.

17. It was further contended that the plaintiff and her husband were living in Singapore and that the property was being looked after on behalf of the plaintiff by her husband's brother Deen Mohammad. The said Deen Mohammad, who was examined as P.W.2, had also deposed that he was looking after the suit property from the time of purchase in the year 1965. The defendant and Pakkirisha had cut the neem tree and that P.W.1 had given a police complaint. The Police did not take any action against the defendant as he was the Panchayat President and that in the year 1977, the defendant had brought Pakkirisha put up a thatched hut and made him to stay in the

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suit property. The plaintiff's husband had given a notice. Thereafter, the defendant had removed the shed, but had put up hay stacks. One Mohammad Sahib, who has signed as a witness in the sale deed, had been examined as P.W.3. He had clearly deposed regarding the plaintiff's purchase of the suit property from Raja Mohammad and also his signing as a witness in the sale deed. Both P.W.2 and P.W.3 have deposed that Zainulabuddin, another signatory as a witness to the sale deed is now dead. P.W.3 had given evidence to show that the suit property was purchased by Raja Mohammad as a separate property and that only that property was sold to the plaintiff. Even though P.W.3 had stated that he does not know from whom Raja Mohammad had purchased the suit property, he had given evidence stating that from the date of the sale only the plaintiff was in enjoyment till the year 1977 when the defendant had entered the property. One Soundararajan, a Clerk in the Block Development, has given evidence as P.W.4 stating that the defendant was the Panchayat President of Pudur from the year 1970 to 1979.

18. From the above, it has been seen by both the Courts below that the plaintiff had purchased the suit property by way of a sale deed in the year 1965 marked as Ex.A.1 and since then the plaintiff has been in enjoyment of the said property and only in the year 1977, the defendant and his men had committed trespass into the property. On the other hand, the defendant had stated that the suit property is a Government Poramboke and that it has been in his possession from the year 1959. He has also given evidence that he has been enjoying the suit property from the year 1959 and that every year he was renewing the fence. It is stated by the defendant that neither the plaintiff nor Raja Mohammad had possession of the property at any point of time. However, it is seen that the defendant had not filed any document to show that the property, in question, is a poramboke property. The defendant has not filed any document including 'B' memo to show that he was in enjoyment of the same. Neither 'B' memo nor the receipts of the payment of penalty have been filed on behalf of the defendant. In the evidence of D.W.1, he had stated that he does not know whether the suit property earlier belonged to Raja Mohammad.

19. Therefore, there was no categorical denial by D.W.1 stating that the suit property had not belonged to Raja Mohammad from whom the plaintiff is said to have purchased the property. The other witnesses, who were examined on behalf of the defendant, have also not categorically stated that the suit property was a Government poramboke land. The defendant has not been in a position to show that he has been enjoying the property from the year 1959. Exhibits B1 to B9 filed on behalf of the defendant are only receipts for house Tax from the year 1970. No receipts have been filed for the previous years. Since receipts from the year 1970 have been filed, it had been argued on behalf of the defendant that even if the plaintiff had the title over the property, the defendant had acquired the right by adverse possession. However, it is seen that the plea of adverse possession has not been made in the written statement. It is proved on behalf of the defendant that the house Tax receipts from the year 1970 are true and that they relate to the suit property. The Courts

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below have found that in Exhibits B1 to B3, B5 and B6 it is mentioned as Tax No.232 and even during the admitted period of the defendant's presidentship, the signature of one Ramadas was found.

20. Hence, the Courts below have accepted the contentions made on behalf of the plaintiff that the receipts must have been prepared using the old receipts. In Exhibit B4 no Tax number was mentioned. In Exhibits B7 to B9 the Tax number was mentioned as 237. In Exhibits B7 and B8, the defendant himself has signed as Administrative Officer. Exhibit B9 is for the period subsequent to the suit. Therefore, the Courts below have accepted the contentions of the plaintiff that since the defendant was the President of the Panchayat, he has caused the preparation of the receipts. From the evidence of D.W.1, it is found that he had put up the village Fakir as a tenant in the suit property for nearly 13 or 14 years. However, nothing had been stated as from which year to which year it was done so. Fakir Shamsuddin, who was examined as D.W.2, in his evidence has stated that it was only due to Nattanmai's grace he was in employment at that time.

21. Therefore, the Courts below have held that D.W.2's evidence cannot be said to be uninterested or independent testimony. One Mani who has been examined as D.W.3, in favour of the defendant, has stated that it was only the defendant, who had fenced and was enjoying the suit property. He had further deposed that he was keeping a saloon in the suit site for 5 or 6 years. Later on, since it was a low lying area, he had shifted his shop elsewhere and then he had requested the defendant to put up a hut. Thereon he had his shop at the suit site paying the monthly rent of Rs.5 and later he had gone abroad. However, it was seen by the Courts below that if D.W.3 had been keeping a shop for 3 years preceding the year 1986 he should have come to the suit property only after the said suit was filed. Though D.W.3 had stated that he has been paying professional Tax, he has not produced the receipt for the same before the trial Court. Even though he had stated that he had a licence for the shop in the suit property, it was also stated that it had been lost. He has also not produced the receipts for the rents paid. Further, D.W.3 had not been in a position to say as to whom the suit properties on all the four boundaries belong. Therefore, his evidence was held to be unbelievable. One Kamaluddin, who was examined as D.W.4, had stated that he requested the defendant to put up a hut in the suit property and was running a cycle shop from 1965 to 1970 at a monthly rent of Rs.5/- and that he had gone to Punganur in the year 1970 and he did not run the shop thereafter. However, he has stated that he was running the shop and nobody else was there along with them in the suit property. However, it is seen from the evidence of D.W.2 and D.W.3 that Kamaluddin was having a cycle shop in the suit property at the relevant time.

22. Therefore, contradictions are found in the evidences of D.W.2, D.W.3 and D.W.4. Even though D.W.4 had stated that he had given rent chit for taking the place on rent and he had paid professional Tax, he had not filed rent chit nor the documents relating to professional Tax.

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23. Further, D.W.4 has also stated that he had his own house 20 houses away. Therefore, his statement that he had a shop in the suit property and he was living there is not believable. The defendant had stated that he was not aware of the suit or appeal filed by Abdul Salam against the plaintiff. However, D.W.1 has admitted that Abdul Salam, who had filed the suit against the plaintiff, is his own sister's husband. The contention of the defendant that he is not aware that his sister's husband, had failed in the suit against the plaintiff in 1965 and had filed an appeal thereafter and had lost it was not believed by the Courts below. O.S.No.219 of 1965 had been filed by the defendant's brother-in-law stating that he was in possession of the property. The claim of the defendant is that the suit property has been in possession from the year 1970. It has not been clearly stated or proved by the defendant that he has openly declared so and that the suit property does not belong to the plaintiff and that he has been enjoying the property for more than 12 years and has perfected title by adverse possession. The defendant had not stated from what date the possession of the defendant had become adverse to the plaintiff.

24. It is also stated that the plaintiff had sent a notice in Ex.B4, on 9.1.1978, stating that the property had belonged to him and that the defendant has trespassed and entered into the suit property and took possession in 1977. On 10.1.1978, the defendant had received the notice. However, the defendant has not sent any reply denying the right of the plaintiff. The defendant who claims adverse possession ought to have sent a reply notice denying the right of the plaintiff. To continue in possession without sending any reply notice tantamounts to continuation of possession of the property accepting the plaintiff title. Therefore, such a possession of the defendant, accepting the plaintiff's title, will not become adverse possession.

25. Therefore, the first appellate Court had held that the trial Court was right in holding that the property was in possession and enjoyment of the plaintiff from 12.3.1965 and that only in the year 1977, the defendant had trespassed and in occupied the suit property and there was no reliable evidence to support the defendant's claims that the suit property was a poramboke and that the defendant had obtained the title by adverse possession. On the other hand, the Courts below have found that the plaintiff has proved by reliable evidence that the defendant along with Pakkirisha had cut down and carried away and appropriated the Neem trees worth Rs.250/- and that subsequently, on 10.12.1977, he has cut down and carried away other trees valued at Rs.100/- and that later, though the plaintiff's son gave a complaint, since the defendant was the Pahchayat President and Nattanmai, no action was taken by the Police.

26. Further, after the notice marked as Exhibit A.4 was sent by the plaintiff, the village Fakir had vacated the suit site and that subsequently, Pakkirisha also did not enter the suit property. Thereafter, the fact that the defendant had removed the thatched shed but had

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prevented the plaintiff from entering the suit site had been clearly proved by reliable evidence. Therefore, the trial Court had allowed the prayer of the plaintiff and decreed the suit in his favour. The first appellate Court had also confirmed the findings of the trial Court.

27. The learned counsel appearing on behalf of the appellant had relied on the following decisions of this Court in support of his contentions:

27.1. In V.MANAKKAN AND FIVE OTHERS Vs. VEERA PERUMAL (1998 (II) CTC 157), it was held that the plaintiff shall stand or fall on the strength of his own case and he shall not rely on the alleged weaknesses in the defendant's case. It had also been held that the findings of the Courts below rendered without pleadings and by misreading of the documents would constitute error of law warranting interference by the High Court in the Second appeal.

27.2. In DHANU PANDARAM Vs. KALI PANDARAM (1992-2-L.W.317), this Court, by overruling objections raised by the respondent, had allowed the plaintiff/appellant to elect to give up the first relief and to confine himself to the alternative reliefs at the stage of the second appeal.

27.3. In ROHAYYA BEEVI Vs. C.VARADARAJULU NAIDU (DIED) (1992 (1) MLJ 90), it was held that the person coming to the Court with a case of title cannot rely on the inconsistencies of the defendant's case.

28. The learned counsel appearing on behalf of the respondent had relied on the following decisions:-

28.1. In TIRUMALA TIRUPATI DEVASTHANAMS Vs. K.M.KRISHNAIAH (JT 1998 (2) SC 231), it was held by the Supreme Court that it is not open to the Second Appellate Court to reappreciate the evidence and reject the evidence accepted by the Courts below.

28.2. In MANIAR ISMAIL Vs. MANIAR FAKRUDDIN (AIR 1989 S.C. 1509), it was held by the Supreme Court that the High Court was not entitled to reverse the findings of fact upon which it was not competent to do in a second appeal, under Section 100 of the Code of Civil Procedure.

29. From the cases cited by the learned counsels appearing on behalf of the parties concerned, it is clear that the High Court could interfere with the concurrent findings of the Courts below. However, it is also clear that the High Court does not normally, under ordinary circumstances, interfere with the concurrent findings of fact. It is only when substantial questions of law are involved, it is open to this Court to exercise its powers under The Civil Procedure Code, 1908. In the present case, there is nothing shown by the appellant to interfere with the findings of the Courts below.

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30. In such circumstances, this Court is of the considered view that the findings of the Courts below cannot be interfered by this Court in the present second appeal. Hence, the second appeal stands dismissed confirming the judgment and decree passed by the Courts below. Parties to bear their own costs.

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Asst.Registrar

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Sub Asst.Registrar

To:

1. The Subordinate Judge,
   Mayiladuthurai.

2. The District Munsif,
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+1 cc to Mr.A.Muthukumar, Advocate Sr.No.11962.

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